**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In re: | ) | |
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| Second Periodic Review of the | ) | MB Dkt. No. 03-15 |
| Commission's Rules and Policies | ) | |
| Affecting the Conversion | ) | |
| to Digital Television | ) | |
| Broadcast Carriage Rules for Satellite | ) | |
| Carriers | ) | |
| | ) | |
| Comments of | ) | |
| | ) | |
| LeSea Broadcasting Corporation, licensee of | ) | |
| KWHH-TV, Hilo, Hawaii and | ) | |
| KWHM-TV, Wailuku, Hawaii; | ) | |

To: The Commissioners

**COMMENTS OF LESEA BROADCASTING CORPORATION**

LeSEA Broadcasting Corporation ("LeSEA"), by its attorneys and pursuant to 47 C.F.R. § 1.415 and 1.419, hereby files the following comments in the above-captioned proceeding. LeSEA is the licensee of two television satellite stations licensed to Hilo and Wailuku, Hawaii,[1] and provides comments on the Commission's proposed special designated status for satellite stations during the transition to digital television service.

**I. The Commission's proposed special designated status for satellite television stations warrants a temporary tolling of those stations' digital television construction obligations.**

[1] The two stations are KWHH, Hilo, Hawaii (Fac. Id. 37103) and KWHM, Wailuku, Hawaii (Fac. Id. 37105).

The Commission presently requires satellite television stations to apply for and obtain digital television construction permits, and construct such facilities timely, notwithstanding that such stations retransmit all or part of the programming of a parent station and are situated in sparsely populated areas previously deemed to have economic bases insufficient to support stand-alone, full-service television operations.[2] Unless some legal, technical or financial obstacle prevents construction, sanctions against satellite stations that have not timely built their digital facilities are levied, including a loss of digital television construction rights altogether, resulting in the ultimate loss of television service to the public.[3]

[2] 47 C.F.R. §73.624(d).

[3] *See* Requests for Extension of the October 5, 2001 Digital Television Construction Deadline, MM Docket 02-113, FCC 02-150 ¶¶ 17-20 (May 24, 2002).

Pursuant to those directives and potential sanctions, both LeSEA satellite stations have applied for and been issued digital television construction permits that required construction no later than May 1, 2002, unless extensions of that deadline were obtained. The Commission's Media Bureau has granted LeSEA two extensions for each station,[4] presumably based primarily upon the financial burden construction of these stations' digital facilities would cause given the stations' financial condition and the insufficient economic bases to rectify that condition in Hilo and Wailuku.[5] LeSEA is now faced with looming deadlines of August 12 and 13, 2003 to either expend funds to construct digital facilities or seek a further extension from the full Commission. In deciding whether to seek a further extension from the full Commission, LeSEA must be mindful of the various general warnings, both written and verbal, issued by the Commissioners that they will not look favorably upon such extension requests. LeSEA is also mindful that extensions are not granted unless adequate actions have been taken to show diligence during the previous extension period.

For LeSEA, the burden of constructing even "minimum build" digital facilities pursuant to special temporary authority and then operating such facilities until the end of the transition remains too high to economically justify such actions, especially given the lack of digital receivers or converter technology for reception of digital signals and the continued operation of LeSEA's stations at a financial loss.[6] Both of LeSEA's satellite stations continue operating at a loss, which is only exacerbated by the additional costs of digital television construction.

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[4] For KWHH (BEPCDT 20020927ABA) and for KWHM (BMPCDT 20030102AAR).

[5] The Bureau has not specified the reason(s) why it has granted LeSEA's extensions, and thus LeSEA cannot definitively state here the basis for the extensions.

[6] LeSEA has completed minimum DTV builds for five of its other full-power stations, and will have one additional full-power station completed this summer. One of the stations already completed is the parent station of LeSEA's two satellite stations in Hawaii, KWHE in Honolulu. Thus, of its eight stations, LeSEA will have completed DTV construction of all but its two satellite stations by this summer.

The Commission's proposal to allow satellite television stations an opportunity to "flash-cut" to digital transmission at the end of the transition period presents, for the first time, potential relief from digital construction obligations LeSEA has thus far not been able to meet for its two satellite stations. If the Commission's proposal were adopted, satellite stations would be allowed to continue only analog operations throughout the transition period, rather than having to not only operate their analog station, but also build and operate digital facilities during that period. As further explained below, LeSEA fully supports such sorely needed administrative relief.

However, the existence of the new "flash-cut" proposal, and the prospect for relief that it, or variations of it, offers, is incongruent with the present rigid mandate to construct or lose digital television rights. LeSEA, along with every other satellite station that has not yet been able to construct its digital facilities, is caught in a proverbial catch 22. They must either forfeit their digital carriage rights by not building, or expend limited funds to either apply for more extensions or build minimum facilities -- all while the Commission is considering granting substantial relief from the regulations requiring those actions!

In certain situations, this burden can jeopardize a satellite station's analog operations, threatening service to the public. Indeed, because of costly digital construction obligations, LeSEA has already considered the extreme option of simply returning the analog licenses for their two satellite stations now and discontinuing service in Wailuku and Hilo altogether. For LeSEA, and likely for many other satellite station licensees, the benefit of a flash-cut rule would be tremendous because it would remove the financial pressures of building and operating a second station during the transition, and avoid undesirable loss of service scenarios.

Given the great potential for relief from the proposed rule, the construction permits or existing extension periods of LeSEA's two satellite stations, as well as all satellite stations, should be temporarily tolled so that satellite stations do not have to further risk the continued operation of their analog stations due to digital television construction obligations. The possibility of administrative relief in the form of a "flash-cut" rule justifies temporarily tolling satellite digital construction permits or existing extension periods, until such time as this rulemaking proceeding is concluded and the "flash-cut" proposal is either adopted or discarded. Such interim relief would immediately remove financial pressures, as well as the potential for loss of present analog service to the public if such pressures dictated a cessation of analog broadcasting. This temporary relief would not be detrimental to the digital transition, because whether the flash-cut rule is adopted or not, LeSEA and likely most other satellite station licensees will be seeking extensions anyway.

LeSEA thus urgently requests that the Commission exercise its authority in administering the digital television transition and immediately issue an order temporarily tolling satellite television station digital permits or extension periods during the pendency of this rulemaking proceeding.

## II. LeSEA supports a flexible flash-cut rule that gives the licensee maximum discretion.

LeSEA fully endorses adoption of a special designated status for satellite stations, but one that is flexible so as to allow licensees maximum discretion. The current flash-cut proposal would permit satellite stations, using their existing analog channel, to flash-cut on that channel from analog to digital at the end of the transition, but only if those satellite stations return their digital authorizations to the Commission. This approach unnecessarily removes the option satellite stations currently have of ultimately choosing between their allotted analog or digital channel for purposes of digital transmissions.

LeSEA suggests that the flash-cut proposal have greater flexibility to permit satellite station licensees to turn in either their analog or digital authorization, at the licensee's discretion. In that way, licensees would have the option of continuing digital operations after the transition on either of their channels.

For one of LeSEA's satellite stations, such an approach would be advantageous. LeSEA's satellite station KWHH in Hilo, Hawaii operates on analog channel 14, which is subject to potential interference from adjacent channel users because it is at the edge of the UHF band. LeSEA has periodically had difficulties with interference on its channel 14 from adjacent channel users that requires the costly installation of filters, and is therefore acutely aware of the potential interference problems that could be created by continued use of channel 14 for digital operations. For these reasons, LeSEA's ultimate plan, assuming that it became financially feasible in KWHH's market, was to elect to and retain its digital channel 23 at the end of the transition, and return its channel 14 analog license.

However, the Commission's flash cut proposal would not permit KWHH to ultimately use its more advantageous digital channel for digital operations. Instead, LeSEA would be forced to flash-cut at the end of the transition from analog to digital operations on channel 14, its present analog channel on which digital transmissions would be susceptible to interference. Given the unknown cost factor to resolve channel 14 interference, LeSEA would choose not to flash-cut, and would thus be in the same situation it is in today – faced with a rigid deadline for digital construction that it cannot financially meet.

Adding the option for satellite television stations to flash cut from analog to digital operations using their digital channel at the end of the transition, and return their no longer used analog authorization, would enable KWHH, as well as other satellite stations with unique reasons justifying retention of their digital channel , to receive the same benefit as stations that flash-cut from analog to digital on their existing analog channel at the end of the transition.[7]

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[7] In Hawaii, as in other geographically isolated regions where satellite stations are prevalent, the retention, rather than the relinquishment of digital authorizations, would not pose significant spectrum inefficiency issues that might otherwise arise from the retention, but delayed use, of digital authorizations until the end of the transition.

Another way to relieve satellite stations from having to build and operate two stations during the transition is to permit the option for satellite stations to flash-cut to digital operations now on either their analog or digital channel, and turn in the unused channel authorization.[8] This option, while costly in the short term, would enable satellite stations to eliminate two-station costs over the long-term, and have the added benefit of speeding the digital transition. The only impediment to this option would be cable and satellite carriage rights, which at present are only granted to digital-only stations on a case-by-case basis. Thus, for this additional option to be a workable one, the "flash-cut now" rule would need to automatically guarantee cable carriage rights for the video programming stream of such digital stations. Without that assurance, the specter of losing carriage rights by immediately transitioning to digital would deter stations from exercising the "flash-cut now" option. LeSEA supports the addition of this option to the flash-cut rule to give it and other licensees of satellite stations the option of employing financially sound strategies in the digital transition.

For these reasons, the summarized flexible and optional provisions should be added to the Commission's proposed flash cut rule.

## III. A flexible flash-cut proposal would not present a legal impediment to digital transition of a television market if "market" is defined to most accurately reflect market conditions.

The Commission's flash-cut proposal wisely contemplates the impact of such a rule on the transition to digital. Specifically, the Commission expresses concern that a flash-cut rule for satellite stations might indefinitely present a legal impediment to the ultimate digital transition of a television market. LeSEA believes that this concern can be addressed by the adoption of a restricted but realistic definition of "television market" to accommodate the geographic distance between satellite stations and their "parent" stations. If a satellite station's "market" is properly defined, permitting satellite television

[8] While some off-air viewers might be adversely affected by a loss of analog television signals, those who are subscribers to cable or satellite systems would not be.

stations to flash-cut will not delay the digital transition, but instead facilitate it in an orderly, common sense fashion.

LeSEA's satellite stations in Hawaii illustrate the wisdom of this approach. The Hawaiian DMA consists of the entire state of Hawaii, which includes four separate and distinct island groups – Kauai, Oahu, Maui and Hawaii. These islands stretch over a distance exceeding 400 miles. Television licensees in the Hawaiian DMA operate a full-power "primary" station on the island of Oahu, and satellite stations on the islands of Kauai, Maui and Hawaii. LeSEA, for example, operates full power "primary" television station KWHE in Honolulu on the island of Oahu, and microwaves its signal to KWHM in the Maui island group, and then to KWHH on the island of Hawaii. In most cases in Hawaii, including LeSEA's, the satellite stations completely retransmit the primary station's signal.

Applying a common sense, realistic televison market definition is key when parent and satellite stations each really have their own market because of the distance between the two. Given the significant distances between parent and satellite stations in the Hawaiian DMA, the most realistic way to define "television market" as used in 309(j)(14) is to use the grade-B contours of the satellite stations. Under that approach, each "market" would transition to digital based upon criteria unique to a satellite station's Grade B coverage area, not the entire DMA or the parent station. Satellite stations that do not commence digital operations now because of the flash-cut rule would not delay the overall digital transition in a DMA because, with a Grade-B television market definition, any delay in digital transition would be properly restricted to the smaller satellite station "market." Thus, when the "network station" extension test is applied in areas where satellite stations have not commenced digital operations because of the new flash-cut rule, the narrow "market" approach will insure that the overall digital transition is not unnecessarily hindered, but instead takes place in phases as conditions dictate in geographic areas. Premature loss of analog service to the public is also avoided with this approach.

Flash-cutting satellite stations would also not present any digital transition impediments when the second extension test – the “converter” test – is applied. Under the “converter” test, the Commission would grant an extension to a station if digital-to-analog converter technology is not generally available in the market. Here too, a Grade-B definition of television market is realistic and appropriate. One way that converter technology becomes more available is if the demand for digital television programming is high, which would be the case if stations have begun digital broadcasting. Admittedly, allowing satellite stations to delay digital broadcasts under a flash cut rule could hinder digital signal demand, and thus the availability of converter technology. However, if the “market” being studied for availability of converter technology was narrowly defined by a satellite station’s Grade-B contour, then any digital delay under the second extension test would properly be restricted to that smaller market, and have no bearing on parent stations or other stations geographically distant from the satellite station. Thus, permitting satellite stations to flash cut to digital at the end of the transition would ensure that digital transition took place only when actual local circumstances dictated, thereby avoiding a premature cessation of analog operations in areas served by satellite stations. Rather than impede the digital transition, flash-cutting satellite stations would facilitate an orderly, measured transition to digital.

Finally, permitting satellite stations to flash-cut to digital would not unnecessarily prolong the digital transition by slowing the penetration of digital television service, if, once again, a Grade-B contour “market” definition is adopted and used for satellite stations. Under the third extension test, transition to digital can be delayed in a television market if there has not been at least 85% penetration of digital television service. The geographic area where the measurement is taken must be considered carefully. Measured too broadly, the 85% target might never be reached. Measured more narrowly, the target would be reached more quickly. Satellite stations serve lesser populated areas, but if those areas are included in a broader “market” in applying the third extension test, the result might be that a satellite station would ultimately be made to prematurely terminate analog service. On the other hand, if digital penetration is measured for satellite stations using a Grade-B contour “market” definition, delays to digital (i.e., continuation of analog service) would be confined to the satellite stations' smaller market. Again, rather than present a widespread impediment to digital transition under the third extension test, flash-cutting satellite stations, under a narrow "market" definition, would cause no greater digital transition delay over no greater a geographic area than is necessary.

## **Conclusion**

For the above reasons, satellite station digital construction permits or extension periods should be temporarily tolled, and a flexible, highly discretionary flash-cut rule for satellite stations should be adopted. Finally, allowing satellite stations to flash-cut would not prolong the digital transition if the "television market" for satellite stations is defined as their Grade-B contours. This narrow television market approach would ensure that digital broadcasts begin and analog broadcasts cease no earlier or later than necessary.

Respectfully submitted:

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